Lynawati bt Abdullah v Abang Sukori bin Abang Hj Gobil & Ors

HIGH COURT (KUCHING) — APPLICATION FOR JUDICIAL REVIEW NO KCH-13JR-13/11 OF 2012
RHODZARIAH BUJANG J
22 APRIL 2013

Civil Procedure — High Court — Power — Claim for lands acquired based on custom of 'serah' — Decision of Native Court of Appeal that applicant non-native — Appeal to High Court — Whether High Court vested with power to review decision of Native Court of Appeal — Whether Native Court of Appeal inferior court to High Court — Whether application frivolous and vexatious

In this case, the applicant was aggrieved by the decision of the Native Court of Appeal which held that she was a non-native prior to 21 July 2005 in regard of her claim for six pieces of land in Kuching which she acquired based on the custom of 'serah' or transfer on payment of 'sagu hati' or compensation from their original Malay owners. The said lands were subsequently acquired by the State Government of Sarawak for the purpose of building a link road. The applicant filed the claim in the Chief's Court Kuching after being informed by the Lands and Surveys Department that the first respondent was also a claimant of the said land. In that court of first instance, the applicant won as well as in the appeal brought by the first respondent to the Chief Superior Court. However, that decision was overturned by the District Native Court and affirmed by the Resident Native Court which in turn declared the first respondent as the rightful owner of the said lands. The Native Court of Appeal affirmed the aforesaid decision, confirming that the applicant as a non-native could not acquire any right over the said land. In opposing the present application, the respondent submitted that it was frivolous and vexatious because the applicant acquired the land in the year 2000, long before she was *gazetted* as a native and the acquisition, therefore, was contrary to s 8 of the Sarawak Land Code, making it illegal, null and void. The main issue before this court was whether the High Court is vested with the power to review the decision of a Native Court of Appeal.

Held, dismissing the application:

(1) The constitution of the Native Court of Appeal under the Sabah Enactment had made it on par with the High Court for it provided that a High Court judge or a person appointed to perform the functions of one sits in it and he is assisted by two District Chiefs or Native Chiefs. In Sarawak, there is only a slight difference to the constitution of the Native

Court of Appeal in that its President is not only a High Court judge but one who has held or is qualified under the Federal Constitution to be appointed as a High Court judge. Given the constitutions of the Native Court of Appeals in both states, these appellate courts are not 'inferior courts' upon which the High Court could exercise its supervisory power under judicial review. Granted that the subordinate Native Courts are inferior courts, it would surely defeat the very purpose of having a Native Court of Appeal if every dissatisfied native litigant at the subordinate court level could run to the High Court for judicial review. It would even render its function otiose if this is allowed and laws clearly must never be legislated in vain (see para 10).

(2) A comparison could be drawn between the Native Court of Appeals in both states to the Election Court established under the Election Offences Act 1954. An election judge is specified in s 33 of that legislation as the Chief Judge or a High Court judge nominated by him for that purpose. The courts have been consistent in their view that a decision of an Election judge is not amendable to judicial review by the High Court. This on account that it is presided by a judge of co-ordinated jurisdiction with the High Court and is therefore not an inferior court. This same reasoning could be raised for the Native Court of Appeal (see para 11).

(3) Disrespect and meddling in each other's jurisdiction would bring disharmony, not the mere existence of another system of courts because each court system is administering laws peculiar to itself which, with respect, the other is not well-versed in or trained. Thus, when the laws are properly legislated to define the constitution, powers and jurisdictions of each court system and mutual respect is accorded by one to the other, all three could co-exist and operate within their own spheres of influence under the judicial landscape of the country (see para 13).

[Bahasa Malaysia summary

Dalam kes ini, pemohon tidak berpuas hati dengan keputusan Mahkamah Rayuan Anak Negeri yang memutuskan yang dia bukan anak watan sebelum 21 Julai 2005 berkaitan tuntutannya untuk enam bidang tanah di Kuching yang diperolehinya berdasarkan adat 'serah' atau pemindahan atas pembayaran 'sagu hati' atau pampasan daripada pemilik-pemilik asal Melayu. Tanah tersebut akhirnya diambil alih oleh Kerajaan Negeri Sarawak untuk tujuan membina pautan jalan. Pemohon memfailkan tuntutan di Mahkamah Ketua Kuching selepas diberitahu oleh Jabatan Tanah dan Ukur yang responden pertama juga adalah penuntut bagi tanah tersebut. Di mahkamah, pemohon berjaya begitu juga rayuan yang dibawa oleh responden pertama kepada Mahkamah Ketua. Walau bagaimanapun keputusan tersebut ditolak oleh Mahkamah Daerah Anak Negeri dan disahkan oleh Mahkamah Residen Anak Negeri yang sebaliknya mengisytiharkan yang responden pertama adalah tuanpunya sah tanah tersebut. Mahkamah Rayuan Anak Negeri mengesahkan

keputusan tersebut, menyatakan yang pemohon sebagai bukan anak watan tidak dapat mengambil alih apa-apa hak ke atas tanah tersebut. Dalam menentang permohonan ini, responden berhujah bahawa adalah remeh dan menyusahkan kerana pemohon telah mengambil alih tanah tersebut pada tahun 2000, lama sebelum dia diwartakan sebagai anak watan dan pengambilan tersebut, oleh itu, bertentangan s 8 Kanun Tanah Sarawak, membuatkan ia salah di sisi undang-undang, tidak sah dan terbatal. Isu utama di hadapan mahkamah ini adalah sama ada Mahkamah Tinggi diletakhakkan dengan kuasa untuk menyemak semula keputusan Mahkamah Rayuan Anak Negeri.

Diputuskan, menolak permohonan:

(1) Perlembagaan Mahkamah Rayuan Anak Negeri di bawah Enakmen Sabah telah menjadikan ia setaraf dengan Mahkamah Tinggi kerana ia memperuntukkan bahawa hakim Mahkamah Tinggi atau orang yang dilantik melaksanakan fungsi untuk mendengar dan beliau dibantu oleh dua Ketua Daerah atau Ketua Anak Negeri. Di Sarawak, hanya terdapat sedikit perbezaan kepada perlembagaan Mahkamah Rayuan Anak Negeri di mana Presiden bukan sahaja hakim Mahkamah Tinggi tetapi juga seseorang yang memegang atau layak di bawah Perlembagaan Persekutuan dilantik sebagai hakim Mahkamah Tinggi. Melihat kepada perlembagaan-perlembagaan Mahkamah Rayuan Anak Negeri di kedua-dua negeri, Mahkamah Rayuan ini bukan 'inferior courts' di mana Mahkamah Tinggi dapat melaksanakan kuasa pengawasannya di bawah semakan kehakiman. Dengan itu mahkamah rendah anak negeri adalah mahkamah rendah, ia akan menjejaskan tujuan sebenar Mahkamah Rayuan Anak Negeri jika setiap litigan anak watan yang tidak berpuas hati di peringkat mahkamah rendah boleh merayu kepada Mahkamah Tinggi untuk semakan kehakiman. Ia akan menyebabkan fungsinya lewah jika ini dibenarkan dan undang-undang jelas tidak boleh digubalkan dengan sia-sia (lihat perenggan 10).

(2) Perbandingan boleh dibuat di antara Mahkamah Rayuan Anak Negeri di kedua-dua negeri kepada Mahkamah Pilihanraya yang ditubuhkan di bawah Akta Kesalahan Pilihanraya 1954. Hakim pilihanraya dinyatakan di dalam s 33 perundangan tersebut sebagai Ketua Hakim atau hakim Mahkamah Tinggi mencalonkan beliau bagi tujuan tersebut. Mahkamah konsisten dalam pandangan mereka bahawa keputusan hakim Mahkamah Pilihanraya tidak dapat dibetulkan kepada semakan kehakiman oleh Mahkamah Tinggi. Ini mengambil kira ia dipengerusikan oleh hakim yang bidang kuasa diselaraskan dengan Mahkamah Tinggi dan oleh itu bukan mahkamah rendah. Alasan yang sama ini boleh dibangkitkan untuk Mahkamah Rayuan Anak Negeri (lihat perenggan 11).

(3) Sikap tidak hormat dan campur tangan dalam bidang kuasa yang lain akan membawa kepada ketidakharmonian, bukan semata-mata kewujudan sistem mahkamah yang lain kerana setiap sistem mahkamah adalah undang-undang mentadbir untuknya sendiri di mana, dengan sikap hormat, yang mana mahkamah yang lain tidak mempunyai pengetahuan penuh atau dilatih. Oleh itu, apabila undang-undang digubal secara betul untuk mendefinisikan perlembagaan, kuasa dan bidang kuasa setiap sistem mahkamah dan sikap hormat bersama diberikan kepada yang lain, ketiga-tiga boleh wujud dan beroperasi dalam lingkungan pengaruh di bawah latar belakang kehakiman negeri tersebut (lihat perenggan 13).]

Notes

For a case on power, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) para 3322.

Cases referred to

Commissioner for Religious Affairs, Trengganu & Ors v Tengku Mariam binti Tengku Sri Wa Raja & Anor [1970] 1 MLJ 222, FC (refd)

Dayang Kayang Dawila v Mahkamah Anak Negeri, Lahad Datu [2005] 5 MLJ 603, HC (refd)

Haji Laugan Tarki bin Mohd Noor v Mahkamah Anak Negeri Penampang [1988] 2 MLJ 85, SC (refd)

R v Secretary of State for the Home Department, ex p Rukshanda Begum [1990] COD 107, CA (refd)

Yong Teck Lee v Harris Mohd Salleh & Ors [2002] 3 MLJ 230, CA (refd)

Legislation referred to

Election Offences Act 1954 s 33
Federal Constitution art 121(1A), Ninth Schedule
Native Courts Enactment 1992 s 11
Native Courts Ordinance (Cap 86) ss 5, 7, 13(3)(b)
Penal Code ss 182, 499
Sarawak Land Code (Cap 81) s 8

See Chee How (Baru Bian Advocates & Solicitors) for the applicant.
Nur Azhar bin Bujang (State Legal Officer, Attorney General's Chambers) for the respondents.

Rhodzariah Bujang J:

RULING

[1] This leave application to issue an order of certiorari raises an interesting question of law which is whether the High Court is vested with the power to review the decision of a Native Court of Appeal. The applicant in this case is

aggrieved by the decision of the Native Court of Appeal which decided that she was a non-native prior to 21 July 2005. That determination of the Native Court of Appeal is fundamental to her claim for six pieces of land in Kuching North Land District which she acquired based on the custom of 'serah' or transfer on payment of 'sagu hati' or compensation from their original Malay owners. The said lands were subsequently acquired by the State Government of Sarawak for the purpose of building a link road and she filed the claim in the Chief's Court Kuching after being informed by the Lands and Surveys Department that the first respondent herein, one Abang Sukori bin Abang Hj Gobil was also a claimant of the said land. In that court of first instance, she won as well as in the appeal brought by the first respondent to the Chief Superior Court. However, that decision was overturned by the District Native Court and affirmed by the Resident Native Court which in turn declared the first respondent as the rightful owner of the said lands. The Native Court of Appeal affirmed the aforesaid decision, confirming that the applicant as a non-native could not acquire any right over the said land.

[2] I must also make clear that though the application is made ex parte, given the novel and interesting point of law raised in it, I have ordered that it be served on the respondents who were then invited to make submissions on it.

[3] This case being at the leave stage, I should heed the guidelines adopted by the Supreme Court in *Tuan Haji Sarip Hamid & Anor v Patco Malaysia Bhd* from the decision of the English Court of Appeal in *R v Secretary of State for the Home Department, ex p Rukshanda Begum* [1990] COD 107, and they are:

> (i) The judge should grant leave if it is clear that there is a point for further investigation on a full inter partes basis with all such evidence as is necessary on the facts and all such argument as it necessary on the law.
>
> (ii) If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.
>
> (iii) If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That inter partes leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the judge at that inter partes leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator' s award, … namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

ARGUABLE CASE

[4] The respondent's counsel, Mr Nur Azhar bin Bujang ('Mr Nur Azhar')

submitted that this leave application is frivolous and vexatious because the applicant acquired the land in 2000 long before she was *gazetted* as a native by *gazette* Notification No 2279 dated 21 July 2005. The acquisition of the land, said Mr Nur Azhar, was therefore contrary to s 8 of the Land Code and was illegal, null and void. That argument, in my view, takes a back seat to another and more pressing concern of mine when I first sighted this application, which have pre-occupied the submissions of both counsels as well. That legal point, which was stated at the outset of this judgment, is whether the decision of the Native Courts of Appeal is justiciable or amendable to judicial review.

JUSTICIABILITY, AN ISSUE

[5] It is not an issue, submitted Mr Simon Siah for the applicant because the Supreme Court had set a legal precedent when it quashed the decision of the Penampang Native Court in *Haji Laugan Tarki bin Mohd Noor v Mahkamah Anak Negeri Penampang* [1988] 2 MLJ 85. He also cited another Sabah case, *Dayang Kayang Dawila v Mahkamah Anak Negeri, Lahad Datu* [2005] 5 MLJ 603 which referred to the decision in *Haji Laugan*'s case. Although the principle of stare decisis dictates that I be bound by the Supreme Court's decision in *Haji Laugan*'s case, however after a minute reading of the decision and the provisions of the statutes in both Sabah and Sarawak under which the Native Courts (and that includes the Native Court of Appeal) are constituted, I would have to respectfully declare that I am not going to be shackled by it for these reasons.

[6] Firstly, the law applicable at the time *Haji Laugan*'s case was decided was the Native Courts Ordinance of Sabah (Cap 86). Haji Laugan was convicted and sentenced to one month jail by the Penampang Native Court for the offence of slander. In his application for leave to issue certiorari, he deposed that the offence is also punishable under ss 182 and 499 of the Penal Code. He was arrested by the police after the complainant lodged a complaint against him and he said he feared that he would be charged again in the magistrate court for the same offence and thus be subjected to double jeopardy.

[7] The Supreme Court in arriving at its decision was troubled by the unclear breaches or offences against native law or custom in s 5 of the Native Courts Ordinance and expressed its views as follows:

> It is unfortunate that what are breaches or offences against native law or custom are not set out clearly in the Ordinance to avoid unnecessary argument on the jurisdiction of the Native Court. The very first question for the Native Court to consider is whether a particular act or conduct amounts to a breach of native law or custom. There is no guide on the exercise of this jurisdiction except for materials like Woodley's Codes and other materials. If, however, the Native Court decides that an act amounts to a breach of native law or custom, we do not think the civil court

should interfere for it will be within the jurisdiction of the Native Court of Appeal under section 10A of the Ordinance to determine such a question since under subsection (2) thereof an appeal shall lie as of right on any ground of appeal which involves the question of native law or custom alone.

[8] It is equally vexed by the unlimited powers of punishment conferred on the Native Courts by s 7 of the Ordinance which according to the Supreme Court is against the intention expressed in item 13 of List MA of the Supplementary List for the States of Sabah and Sarawak of the Ninth Schelule of the Federal Constituition in that the jurisdiction and powers of the Native Courts 'shall not include jurisdiction in respect of offences except in so far as conferred by federal law'. Thus it concluded that the power to impose a prison sentence under s 7 of the Ordinance as opposed to power to award compensation can only be authorised by a federal legislation to be passed in accordance with the said item 13 and 'the Penampang Native Court had therefore acted without or in excess of jurisdiction when it imposed the sentence on the appellant' ie Haji Laugan.

[9] The grave concerns expressed by the sessions court which formed, in my respectful view, the bedrock of its decision, have been addressed by the repeal of the Ordinance in 1993. In its place now is the Native Courts Enactment of 1992 which has a comprehensive and clear provisions on the breaches of customary law together with their prescribed penalties. What is more under s 11 of the Enactment, a sentence of imprisonment imposed by a Native Court must be endorsed by a magistrate. The law, in other words, have moved with time and when *Haji Laugan*'s case is viewed against this development in the law, its ratio can no longer be applied.

[10] Secondly, the constituition of the Native Court of Appeal under the Sabah Enactment has made it on par with the High Court for it provides that a judge of the High Court or a person appointed to perform the functions of one sits in it and he is assisted by two District Chiefs or Native Chiefs. In Sarawak, there is only a slight difference to the constituition of the Native Court of Appeal in that its President is not only a High Court judge but one who has held or is qualified under the Federal Constitution to be appointed as a High Court judge (see s 13(3)(b) of the Native Courts Ordinance 1992). Given the constituitions of the Native Court of Appeals in both states, these appellate courts are not 'inferior courts' upon which the High Court could exercise its supervisory power under judicial review. Granted that the subordinate Native Courts are inferior courts, it would surely defeat the very purpose of having a Native Court of Appeal if every dissatisfied native litigant at the subordinate court level could run to the High Court for judicial review. It would even render its function otiose if this is allowed and laws clearly must never be legislated in vain.

[11] Thirdly, a comparison can be drawn between the Native Court of Appeals in both states to the Election Court established under the Election Offences Act 1954. An election judge is specified in s 33 of that legislation as the Chief Judge or a High Court judge nominated by him for that purpose. The courts have been consistent in their view that a decision of an election judge is not amendable to judicial review by the High Court (see, for instance, the decision of the Court of Appeal in *Yong Teck Lee v Harris Mohd Salleh & Ors* [2002] 3 MLJ 230 and for which leave to appeal to the Federal Court was refused). This on account that it is presided by a judge of co-ordinate jurisdiction with the High Court and is therefore not an inferior court. This same reasoning, in my view can be raised for the Native Court of Appeal.

[12] Fourthly, although as stated by the Supreme Court in *Haji Laugan*'s case that the native courts are creatures of statutes, but just like the Shariah Courts, their creations, unlike say the Industrial Courts or the Labour Courts, are specifically provided for in the Federal Constitution, in the State List (List II) and Supplementary List (List MA) of the Ninth Schedule, respectively although with no express provisions of their own like the civil courts. Whilst I note that it was mentioned in *Haji Laugan*'s case that the Federal Court had in *Commissioner for Religious Affairs, Trengganu & Ors v Tengku Mariam binti Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222 affirmed the High Court's decision to question the validity of a *wakaf* issued by the mufti, which was published in the *Gazette*, that clearly was not a decision of the Shariah Court that was called into question but that of a religious official. Even though I appreciate Mr Simon Siah's argument that by virtue of art 121(1A) of the Federal Constituition the civil courts shall have no jurisdiction over the matters within the jurisdiction of the Shariah Court whereas there is no such express provision in respect of the Native Court, the latter's position in my view is still the same given the constituition of the Native Court of Appeal and the express creation of the Native Courts under the Federal Constituition.

CONCLUSION

[13] The Supreme Court in *Haji Laugan*'s case quoted p 70 of Hickling's book, *Malaysian Law* in which the learned author justified the control of the High Court over Native Courts by saying that such a control is important since it is essential to have one supreme authority in any field of human activity. An English history illustrates, continues the learned author, two systems of courts with parallel authority cannot exist together in harmony. It is an opinion which I respectfully beg to differ. In my view, it is disrespect and meddling in each other's jurisdiction which would bring disharmony, not the mere existence of another system of courts because each court system is administering laws peculiar to itself which, with respect, the other is not well-versed in or trained. Thus, when the laws are properly legislated to define the constituition, powers

and jurisdictions of each court system and mutual respect is accorded by one to the other, all three can co-exist and operate within their own spheres of influence under the judicial landscape of our country. I would sum up by stating that the application for leave is dismissed with cost which has been agreed at RM500.

Application dismissed.

Reported by Afiq Mohamad Noor